

1788. to *Dagberry*; and this sum of £400. is credited to him in the accounts of the estate kept by the latter.

With respect to the *second* and *third* points, it must be observed, that the Courts of Chancery make it a general rule, that he who receives money should be answerable for it; and, therefore, if one Executor becomes insolvent, or bankrupt, the other shall not be charged. There is a difference, however, between Legatees and Creditors; the former being appointed, as well as the Executor, by virtue of the Testator's will; and consequently cannot impose the same responsibility as the latter. The case in 1 *P. Wms.* 244. is the only one in point; but on that authority, and the justice of the matter itself, under all its circumstances, we are of opinion that, although *Brown* would be chargeable if there were creditors, and a deficiency of assets to satisfy them; yet, that he is not answerable to the Legatees.

The £400. must therefore be deducted from the account, with the nine years interest which is charged upon it. As to the rest, we think *Brown* ought to be well satisfied to pay the interest; particularly as it is not charged from the year 1776 to the year 1781.

The decision of the *Orphan's Court* was accordingly affirmed; deducting £400. and nine years interest, from the account.

SHEWELL *versus* WYCOFF.

THERE was a report in this cause, and at the distance of a month, after Judgment *nisi* had been entered, the Defendant filed reasons in exception to the report.

But, BY THE COURT:—We must not sport with things of so solemn a nature as Reports of Referees, and Verdicts of a Jury. The exceptions are much too late. The rule is, that unless they are filed within four days, the Judgment *nisi* becomes absolute.

Sergeant for the Plaintiff—*Bradford* and *Ingersoll* for the Defendant.

ZANE'S EXORS. *versus* COWPERTHWAIT, Sheriff.

THIS cause had been argued in the last Term by *Lewis* and *Ingersoll* for the Plaintiff, and *Rawle* and *Bowie* for the Defendant; and now the CHIEF JUSTICE stated the question, and delivered the opinion of the Court, in the following manner:

M'KEAN, *Chief Justice*.—In this case the Executors of *Zane* had issued a *Fieri facias* against *Joseph Wharton*, to which the present Sheriff made return, that he had levied to the value of the Plaintiff's demand, on specific goods, enumerated in a certain schedule. In consequence of this return, a *Distingas*, directed to the Coroner
was

was issued against the Sheriff, to compel a sale of the goods; and the question that now awaits the determination of the Court, is, whether a *Distingas*, under these circumstances, will lie?

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The case has been well argued; but we are surprized that so few authorities are to be found upon the subject. In searching the books of Precedents, indeed, we have remarked, that the *Distingas* uniformly runs against *A. B. nuper vice-comes*, though with this distinction, that, in some instances, it commands him to be distrained 'till he pays the money into Court, and, in others, 'till the late Sheriff has paid it over to the present Sheriff. In 6 Mod. 295, Lord C. J. Holt says, that after the Sheriff has made his return, "levied on specific goods," the regular mode of proceeding is to issue a *Venditioni Exponas*; that where he has returned "levied to the value," he is bound to sell without further process; and that it is usual to issue a *Vend. Exp.* when the Sheriff continues in office, but a *Distingas* when he has left it. In the close of the same case, however, it is likewise Holt's opinion, that a *Distingas* to the Coroner will lie, even while the Sheriff, who made the return, is in office. This we mention for the sake of the practice; for, it is certain, that by the *Fi. fa.* the Sheriff has authority to sell the goods upon which he has levied; the *Venditioni* only giving, by act of Assembly an additional authority in the case of *Lands*.

But we have enquired into the practice of the Courts upon this occasion; and, we find, that it has been the practice of the *Common Pleas*, and, in several instances, of the *Supreme Court*, to issue a *Distingas* to the Coroner, where the Sheriff has made a return of goods levied to the value: We are, therefore, of opinion that, in such a case, a *Distingas* will lie.

A second point, however, was made in this cause. It appears that a *Replevin* for the goods in question, had issued to the Coroner, and, that by virtue of that writ, he had taken them out of the possession of the Sheriff; so that the Sheriff was unable either to produce them, or to proceed to a sale.

The *Replevin* was highly irregular; an action of *Trespass* being the proper remedy for a wrongful levy; for, by an act of Assembly, it is expressly declared, that goods taken in execution shall not be replevied. 2 State Laws 194.

We think, therefore, that as the *Replevin* would have been set aside upon motion in the *Common Pleas*; and as the goods were taken from the Sheriff under colour of law, it would be hard to issue a *Distingas* against him, without a previous application to the Court, and its being thereupon awarded. For this reason alone

Let the *Distingas* be quashed.

WILLIAMS *versus* CRAIG.

THIS cause being referred, a report was made in favor of the Plaintiff for a considerable amount, to which the following exceptions